No. 83-724

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KATHRYN R. ROBERTS, Acting Commissioner, Minnesota Department of Human Rights; HUBERT H. HUMPHREY, III, Attorney General of the State of Minnesota; and GEORGE A. BECK, Hearing Examiner of the State of Minnesota,

Appellants,

v.

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of itself and its qualified members,

Appellee.

On Appeal From The United States Court Of Appeals For The Eighth Circuit

BRIEF OF CONFERENCE OF PRIVATE ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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BRIEF OF CONFERENCE OF PRIVATE ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

INTEREST OF THE CONFERENCE OF PRIVATE ORGANIZATIONS

This brief is presented by the Conference of Private Organizations ("CONPOR") in support of the position of the Appellee, The United States Jaycees. Counsel for both Appellants and Appellee have consented to CONPOR's filing of the instant brief *amicus curiae*.

The Conference of Private Organizations is a coalition of membership associations. Its Board of Directors is composed of leaders of the following organizations:

(i) The Benevolent and Protective Order of Elks is a benevolent, ritualistic and fraternal society with 1,650,000 members in 2,250 lodges. It has a representative government controlled by its members. Its membership is limited to males, of good moral character, who are 21 years of age or older. Members must also express a belief in God, be United States citizens, and live within the jurisdictional limits of the lodge. There are two womens' auxiliaries for the wives and female relatives of Elks members—the Ladies of the Elks, and the Supreme Emblem Club of the United States. These Elks organizations engage in numerous civic and philanthropic programs, all of which provide benefits without regard to the race, creed, sex, ethnic background, or religion of the recipients.

(ii) The Supreme Lodge, Knights of Pythias is also a benevolent, ritualistic, and fraternal society. It has a representative government controlled by its members. It is composed of 140,000 members in 2,000 lodges. It limits its membership to males of sound health and good moral character, who believe in a Supreme Being, and can read and write. Persons in certain occupations (e.g., liquor dealers) are excluded. It is affiliated with a separate sororal society, the Supreme Temple Order of Pythian Sisters,

which has 48,000 women members in 1,027 local units. Both organizations conduct and sponsor civic and philanthropic activities, all of which are made available to persons regardless of race, creed, sex, ethnic background, or religion.

(iii) The Loyal Order of Moose is also a benevolent, ritualistic and fraternal society, with 1.3 million members in 2,250 lodges. Its membership is limited to males who are 21 years of age or older and who believe in a Supreme Being. Members of the Communist Party or convicted felons are not eligible for membership in the Moose. There is also a women's auxiliary, the Women of the Moose, with about 400,000 members. The wives and female relatives of Moose members are eligible for membership in the latter organization. Both organizations offer all their civic and philanthropic benefits to the public on a totally nondiscriminatory basis.

(iv) The Great Council of U.S. Improved Order of Red Men is also a benevolent, ritualistic and fraternal society with 53,616 members in 940 local lodges. Its representative government is controlled by its members. Its membership is limited to males who are United States citizens and believe in a Supreme Being. It is affiliated with a separate organization, the Degree of Pocahontas, whose members consist of women relatives of Red Men members. There are 722 local units of the Degree of Pocahontas. These organizations also offer civic and philanthropic programs to the public on a totally nondiscriminatory basis.

(v) The National Club Association ("NCA") is a Washington, D.C. association, whose membership consists of over 1,000 social clubs throughout the United States with over 900,000 individual members. All of the members of NCA restrict their membership on one or more bases, and some of such member clubs admit only men or only women to membership. Other membership criteria include professional status; religion; economic class; business, literary or other achievements; athletic avocation; social congeniality; and the like.

(vi) The United States Power Squadrons is a membership association whose primary activity consists of providing education on boating and boating safety, and navigation. It has over 50,000 members in about 450 local

groups, who exercise control over its affairs. Prior to 1982, its membership was limited to males 18 years of age or older who were of good moral character, and had demonstrated certain boating knowledge and skills. In 1982, the organizaton voted to allow women to become members if they satisfied the other qualifications.

(vii) The United States Jaycees is a nonprofit membership association whose purpose is to provide young men with an opportunity for personal development and achievement through participation in the affairs of their community, state and nation. In 1981 it had about 295,000 regular members in about 7,400 local chapters. Its regular members must be male and between 18 and 35 years of age. Only regular members may vote or hold office, but other persons may participate in the other activities of the organization through an "associate membership."

CONPOR was formed in order to defend and protect the fundamental rights of its members, and citizens generally, freely and privately to associate upon such terms and conditions as they shall solely determine. CONPOR promotes this right through participation in judicial cases, providing information to legislative and administrative officials, and through educational activities.

CONPOR's interest in this case arises from the diversity of the membership requirements, limitations and restrictions of its member organizations, and their component units. Some of the component units which it represents limit their membership primarily on the basis of broad objective classifications, such as gender, age, religious belief, or literacy. Other component units primarily rely on subjective membership qualifications, such as congeniality, avocations, social or economic status. Most employ both types of restrictions to one degree or another. We believe that membership associations are protected by the Constitutional right of association in restricting their core membership functions—voting, office-holding, and policymaking—on the basis of either broad, objective classifications such as gender, or on the basis of subjective factors such as congeniality, social status, or the like. Each of these membership policies, if implemented in a bona fide manner, represents a choice which is totally within the discretion of

the association's members, and may not be subject to regulation or control by government.

To allow the State to truncate the Jaycees' membership limitations, merely because it has a broad class-restricted membership limitation, and because it offers some programs to the general public, would create a precedent which would threaten the similar membership limitations used by many fraternal orders, associations and clubs. Such organizations contribute greatly to the unique pluralism and diversity of our country. The rights of individuals to form such associations must not be curtailed by a governmentally dictated "index" of proscribed membership limitations.

SUMMARY OF ARGUMENT

This Court has held that the Constitution prohibits government from interfering with the right of individuals to form associations for the purpose of meeting and conducting activities with respect to economic, religious, cultural or social matters of mutual interest. The Court has recognized that such associations may restrict membership on the basis of broad objective classifications—such as "all white, all black, all-brown * * * all yellow, * * * all Catholic, all Jewish, all Gentile, or all agnostic." *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575 (1973), quoting *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting). In addition, Congress and the courts have long recognized the right of individuals to restrict membership in an association on totally subjective bases, for example, through a single-member-veto procedure.

The mandatory order of the Minnesota Commission here grossly violates the associational rights of the U.S. Jaycees. The order not only destroys a principal membership qualification of the U.S. Jaycees in Minnesota, but it allows state and local Jaycees units in Minnesota to continue using the "Jaycees" name and program even if the U.S. Jaycees withdraws from the State. The Minnesota Commission's order is thus in total conflict with the right of genuine membership organizations—of which there are thousands in the United

States—to use as membership qualifications broad, objective class restrictions, such as gender, age, race, religion, national origin, and the like.[1]

The Minnesota Commission erroneously refused to recognize the U.S. Jaycees' associational rights on the ground that those rights were forfeited by reason of the Jaycees' vigorous efforts to recruit as regular members all persons who met its gender and age qualifications. But the right of individuals to form restricted-class membership associations may not be curtailed merely because their association solicits new members in one manner or another, or because it enrolls all applicants who meet the objective membership qualifications.

The Minnesota Commission also erred in curtailing the U.S. Jaycees' associational rights on the basis that the local Jaycees' chapters were influential in the Minnesota business community and helpful to the business advancement of members. There is no basis for such a test, and it would be impossible to apply fairly and uniformly. Moreover, it would discourage fraternal, social and civic groups from providing valuable civic and philanthropic services to the community, for fear of increasing their "influence" and being classified as public accommodations. Similarly, membership associations like the Jaycees should not be subject to government regulation on the ground that their education and philanthropic services to the public create an invidiously discriminatory "second class" membership. Such services do not constitute a real "membership"; if these services were treated as such, restricted-class fraternals, clubs and similar associations would have to eliminate or curtail them to the detriment of the community.

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[1] The injury to associational rights caused by governmental intrusions upon class restrictions of membership associations such as that here is demonstrated by *Curran* v. *Mount Diablo Council of Boy Scouts*, 195 Cal. Rptr. 325 (Cal. App. 2d Dist. 1983), juris. statement filed Mar. 14, 1984 (U.S. Sup. Ct. No. 83-1513). There the California court held that the Boy Scouts of America had no right to restrict homosexual men from serving as Scout leaders.

Nor may the restricted-class membership bond of the U.S. Jaycees be destroyed by government on the ground that it is unrelated to the speech and advocacy conduct of that organization. The freedom-of-association guarantee is not limited to speech and advocacy, but protects individuals in forming associations and providing all manner of mutual cultural, legal, economic and religious benefits to members. In any event, speech and advocacy activities of membership associations typically are intertwined with their core membership restrictions, and government has no right to decide whether changing the membership restrictions would or would not alter the association's philosophy or positions on issues.

The Minnesota Commission has fundamentally erred in confusing characteristics and rights of a "purely private" association, with the characteristics and rights of a restricted-class membership association like the U.S. Jaycees. "Purely private" associations must be governed by their membership, and may maintain their exclusive membership on the basis of any standard they choose, be it rational or arbitrary. A restricted-class membership association is similarly member-controlled, but need not exclude applicants on the basis of subjective factors as long as it uniformly applies its class restrictions. The approach of the Minnesota tribunals would extinguish restricted-class membership associations. Most of the organizations represented by CONPOR are restricted-class membership associations, as well as purely private membership associations.

Even if certain programs of the Jaycees may be construed to constitute a public accommodation because those particular activities are open to the public, the Minnesota Commission erred in opening up the U.S. Jaycees' core membership functions—voting, office-holding, and policymaking—to women. Requiring the U.S. Jaycees to admit women to its governing councils is not appropriate relief in a public accommodations case, and severely infringes its basic associational rights.

The Minnesota Commission's order eliminating the single-gender membership limitation of the U.S. Jaycees does not have the requisite paramount importance, and is not narrowly tailored to avoid the unnecessary stifling of associational rights. Most importantly, the Commission has not demonstrated why the gender limitation of the U.S. Jaycees must be eradicated at the same time that the Commission avows that gender limitations of other similar associations will not be disturbed. There is no merit to the State Commission's attempt to apply the prohibition on "separate but equal" racially discriminatory schools to single-gender membership associations. Racial discrimination in education is subject to legal and Constitutional principles entirely different from gender restrictions in voluntary associations.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY HELD UNCONSTITUTIONAL THE COMMISSION'S MANDATORY ORDER REQUIRING THE JAYCEES TO ADMIT WOMEN TO ITS INTERNAL GOVERNING AND VOTING PROCESSES

A. Government Is Prohibited by The Freedom-Of-Association Guarantee From Interfering With The Class Membership Restrictions Of Voluntary Associations.

In *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575 (1973), this Court held that governments were strictly limited in the actions which they could take against restricted-membership groups—even if those groups discriminated on the basis of race. The Court specifically concluded that such a group could not be excluded from access to a public park merely because it had an "all-Negro, all Oriental, or all-white" membership policy. *Ibid.*

In so holding, the Court quoted with approval *(ibid.)* the rationale of Justice Douglas' dissenting opinion in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 179-180 (1972):

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

The *Gilmore* opinion went on to explain why freedom of association should protect such restricted-membership groups, stating that (417 U.S. at 575):

> The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.

The duty of governments to refrain from interference with the internal membership processes of voluntary organizations has been equated with the immunity of the marital relationship from governmental regulation mandated by the freedom-of-association guarantee. In *Griswold* v. *Connecticut*, 381 U.S. 479, 483-484 (1964), this Court overturned state laws regulating the use of contraceptives by married couples, stating that (*id.* at 483):

> * * * [W]e have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members.
>
> * * *
>
> The right of "association," like the right of belief * * *, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly in-

cluded in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The Court's rationale in *Griswold* relied on *NAACP* v. *Alabama*, 357 U.S. 449 (1958). There a state had brought an action to banish from its boundaries an organization which it deemed inimical to the public welfare, and had obtained an order requiring disclosure of membership lists. This Court viewed the disclosure order as an indirect attempt to suppress the activities of the association, and held that the order was barred by the freedom-of-association guarantee (*id.*, 357 U.S. at 460-461):

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process clause of the Fourteenth Amendment, which embraces freedom of speech.
>
> Of course, *it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters*, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. [Emphasis added.]

B. The Mandatory Order Of The Minnesota Commission Grossly Intrudes Upon The U.S. Jaycees' Constitutional Right To A Restricted-Class Membership Association.

In the instant case, the Minnesota Commission below has not merely sought to deny a restricted-membership association access to public facilities, as in *Gilmore*, *supra*. Instead, it has imposed a severe governmental restriction upon the associational rights of the U.S. Jaycees, issuing a mandatory order prohibiting the U.S. Jaycees from continuing in Minnesota their all-male associational bond. (J.S. App. A-108.)[2] Indeed,

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[2] "J.S. App. ____" references are to the Appendix to Appellants' Jurisdictional Statement.

the mandatory order goes even further and deprives the national Jaycees organization of the right to withdraw from Minnesota, or to protect its integral associational character and rights in that State. For the order prohibits the U.S. Jaycees from "Revoking the charter of any Jaycee local organization * * * or state organization member * * * or denying any privilege or right of membership * * * because either [state or local organization] extends to women all the rights and privileges of * * * membership." *(Ibid.)*

The scope of the Minnesota Commission's intrusion into the associational rights of an indisputedly genuine membership organization is truly astounding. This Court's opinion in *Gilmore* recognized that the right of individuals to form and participate in associations with restricted-class memberships of all kinds is guaranteed by the Bill of Rights. Judge Arnold noted below (J.S. App. A-29) that "there are hundreds of private (in the sense of nongovernmental) associations in this country whose membership is limited to men or to women." For government to require all-black groups such as Prince Hall Masonry to accept whites, or all-Norwegian organizations such as the Sons of Norway to accept non-Norwegians, or all-female Jewish organizations such as Hadassah to accept male Gentiles, would seriously curtail associational rights, and would deprive the Nation of the diversity which is part of its strength and heritage. The U.S. Jaycees is similarly protected by the Constitution in seeking to continue the all-male character of its association.

The Minnesota tribunals were led to their intrusion on rights of association by a boundless extension of the law of public accommodations, to the extent that it totally overrode the First Amendment protections of genuine membership associations. Their rationale was improper for a number of reasons.

1. The manner or size of membership recruitment does not destroy the associational rights of a restricted-class membership organization.

The Minnesota State tribunals initially erred by dwelling at length on the vigorous efforts of the U.S. Jaycees to obtain new

members, and by concluding therefrom that the U.S. Jaycees had no restricted-membership policy protected by freedom of association, but were rather engaged in the commercial business of selling memberships. Such a rationale severely curtails the rights of association of restricted-class membership associations recognized by this Court. The freedom of association guarantees at least includes the right of association members to persuade persons who meet membership requirements to join the association. The Commission's order restricts this right in an unreasonable manner.

The U.S. Jaycees is far from unique in having a large nationwide membership, which it vigorously seeks to expand, within the confines of its restricted-class membership qualifications. There are hundreds of large organizations in this country which have single-gender membership restrictions, and hundreds more which have racial, national origin, religious, or other like membership restrictions.[3] (See J.S. App. A-29.) So long as associations are genuine bona fide membership organizations, and confine their recruiting within their objective

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[3] For example, in addition to the CONPOR organizations, Gale, *Encyclopedia of Associations* (16th ed., 1981) lists the following large single-gender national organizations:

Prince Hall Masonry: all black males, of the Protestant or Jewish faith, with 400,000 members;

Knights of Columbus: all male practical Catholics, with 1.2 million members;

Hadassah, The Womens Zionist Organization of America: all Jewish females, with 370,000 members;

B'nai B'rith Women: all Jewish females with 150,000 members;

National Association of Women's Clubs: all black females, with 45,000 members;

P.E.O. Sisterhood: all females, with 212,000 members;

Improved Benevolent Protective Order of Elks of the World: black males, with 450,000 members;

Association of Jewish Leagues: all females between ages of 18 and 42, with 1.3 million members;

General Federation of Womens Clubs: all females, with 500,000 individual members represented;

membership restrictions, there is no basis for destroying their membership qualifications under the guise of public accommodations law. Indeed, it would be impossible to draw a line between permissible and impermissible types or sizes of recruiting campaigns for such organizations. One organization may solicit prospects door to door; another may phone persons with ethnic-sounding surnames; and another may place notices in religious or ethnic newspapers—the manner and vigor of the recruitment are irrelevant for purposes of the freedom-of-association guarantee.

The membership recruiting of the U.S. Jaycees is not unlike the practices or other restricted-class membership associations, such as national fraternal and service organizations. Its membership campaigns do not constitute a commercial business of selling services, for recruiting is strictly limited to males between the ages of 18 and 35. Indeed, if the U.S. Jaycees were merely a commercial business, it would hardly have expended hundreds of thousands of dollars in litigation fees, in courts throughout the country, defending its purpose and right not to engage in the allegedly lucrative "sale" of

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Altrusa: all females, with 20,000 individual members represented.

An informal survey of Minnesota associations indicates that those with membership limited to females have over 40,000 members. They include business and professional groups (e.g., the Alliance of Women in Architecture, Council of Railroad Women, and Women's Writing Guild); all female religious groups (e.g., the Lutheran Church Women, Baptist Women's Council, Catholic Women's Group, B'nai B'rith Women, Christian Women's Fellowship, Church Women United, Hadassah (Jewish), Mizradi Women's Organization, the Eastern Star (composed of Master Masons and female relatives only), and the American Atheist Women); and ethnic organizations (e.g., the Italian American Women, Philippine-American Women, Polish Women of the United States, Baltic Women's Council, Slovak Women's Union, and Women's auxiliaries of such groups as the Sons of Norway and the Sons of Italy).

memberships to women.[4] Nor would it refrain from so-called "sales" of memberships to men over 35.

The associational rights guaranteed by the Bill of Rights protect all genuine, bona fide membership organizations, not just organizations which have ineffective or unorganized or minimal recruiting programs. So long as the membership recruiting is confined within an association's objective membership restrictions, the recruiting may not be held equivalent to a commercial business for freedom-of-association purposes.[5]

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[4] See *Junior Chamber of Commerce of Kansas City, Missouri* v. *Missouri State Junior Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975) (receipt of federal funds (a practice since discontinued) does not make Jaycees a governmental actor for purposes of the Fifth Amendment); *New York City Jaycees, Inc.* v. *The United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975) (same); *Junior Chamber of Commerce of Rochester, Inc.* v. *United States Jaycees*, 495 F.2d 883 (10th Cir.), *cert. denied*, 419 U.S. 1026 (1974) (same); *United States Jaycees* v. *Bloomfield*, 434 A.2d 1379 (D.C. App. 1981) (Jaycees is not a "place of public accommodation" within the meaning of the D.C. Human Rights Act of 1977, D.C. Code § 6-2241(a)(1) (Supp. 1978)); *United States Jaycees* v. *Richardet*, 666 P.2d 1008 (Alaska 1983) (Jaycees is not a public accommodation under Alaska law, Alaska Stat. §§ 18.80.230(1), .300(7)); *Fletcher* v. *U.S. Jaycees*, No. 78-BPA-0058-0071 (Mass. Comm'n Against Discrimination Jan. 27, 1981) (Jaycees is a place of public accommodation within the meaning of Mass. Gen. Laws Ann. ch. 272, §§ 92A, 98), on appeal, Mass. Sup. Jud. Ct.

[5] The community swimming pool cases are consistent with this principle. In those cases, the courts determined that the memberships were in fact offered and sold to the entire population living within the natural geographic marketing area of the pool, yet blacks living in that area were solely and arbitrarily excluded. The courts held that such exclusion was a "badge of slavery" prohibited by legislation implementing the Thirteenth Amendment, that the exclusion represented denial of a valuable property right protected by those provisions, and that blacks meeting the geographical and other qualifications for membership must be admitted. E.g., *Tillman* v. *Wheaton-Haven Recreational Assn., Inc.*, 410 U.S. 431, 438 (1973);

2. A restricted-class membership association's influence and involvement with the community does not give rise to public status.

The Minnesota tribunals similarly erred in attempting to justify State regulation of the U.S. Jaycees' internal membership policies on the basis of a quasi-state-action analysis. Of course, the Eighth Circuit and other courts of appeals had previously held that the U.S. Jaycees was not an instrumentality of government by reason of its tax exemptions and other limited governmental contacts.[6] The Minnesota State tribunals nonetheless advanced a variant of that argument, contending that the U.S. Jaycees somehow loses its right to a restricted-membership policy because its membership programs might advance the individual business interests of its members. Under such a theory, this Court's rationale in *Gilmore* v. *City of Montgomery*, *supra*, that government may not interfere with restricted-class membership associations, would have to be limited to restricted-class membership associations *so long as they do not advance their members' business interests*. If membership in the association was determined to provide some unspecified degree of help to the members' business careers, the association would be declared "public" and presumably anyone could become a member.

The unsoundness of such a rationale is self-evident, and is demonstrated by the opinions of the State tribunals below. The Kiwanis International association has an all-male membership policy like that of the U.S. Jaycees. (J.S. App. A-38—A-40.) Yet presumably because membership in Kiwanis International in Minnesota is not viewed as so necessary to business

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Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Here, by contrast, the Thirteenth Amendment and 42 U.S.C. § 1981 are not implicated (see note 12, *infra*), and there is no offering of memberships to the entire public. Moreover, it is undisputed that blacks and other minority males between the ages of 18 and 35 are legally entitled to become members of the Jaycees.

[6] See note 4, *supra*.

advancement as membership in the U.S. Jaycees, Kiwanis International is not regarded as a public accommodation by the State. (J.S. App. A-83, A-122—A-123.)

It is clear that such a line between permissible and impermissible restricted-class membership organizations would severely denigrate constitutional rights of association, and would be impossible to apply rationally and fairly. Moreover, such a test would lead to varying results within the same association. For example, the U.S. Jaycees would be classified a "public accommodation" in Minnesota where its activities were strong and influential, but would have to be viewed as "private" in states where it had less influence. Such varying results would create havoc with the membership policies of national membership associations. Any such test would severely infringe the freedom of association of such groups, by imposing pressure for them to impose arbitrary limitations on their size or influence in any one area.

Basing allowance of membership restrictions on business or other community influence or prestige would have consequences severely detrimental to the public welfare. Inherent in such a test is the proposition that membership associations must limit their involvement in business and community affairs as the price of retaining class membership restrictions. Such a rule would strike at a central purpose of fraternal organizations such as those in CONPOR—the Elks, Moose, Knights of Pythias, and Red Men—as well as civic and service organizations. These and similar fraternal (and sororal) societies were created to form a fraternal spirit out of which would flow service for the community and for charity. That goal has been enormously successful, and the civic and philanthropic service of fraternals and sororals now amount to hundreds of millions of dollars a year. For example, in the fiscal year ended March 31, 1983, the contributions of the Elks for such purposes were valued at $53.4 million.

These activities necessarily involve members of fraternals quite deeply in their business and civic communities. Under the Minnesota tribunals' rationale, such involvement and in-

fluence would lead to public accommodations status, and the loss of ability to enforce class membership restrictions.

3. Membership associations do not lose their right to maintain restricted-class membership qualifications by making certain programs or facilities available to the general public.

The Minnesota tribunals additionally erred in interfering with the membership policies of the U.S. Jaycees under the guise of eliminating "second class" membership status for women. The fact that women are allowed to participate in some of the U.S. Jaycees' programs does not mean that they must be admitted to the core internal membership processes of the U.S. Jaycees. On occasion, some fraternal organizations and social clubs allow parts of their facilities to be used by civic, educational, philanthropic and other public groups. They also provide educational, charitable, civic and other service programs to the public. But outside groups do not become "second class" members by reason of such programs. Communities would suffer greatly if private social clubs could not offer programs to the public—such as allowing the local Red Cross to use the swimming pool on occasion to give lifesaving courses—for fear of losing restricted-class membership status.

Fraternals, social clubs, and civic and service organizations thus commonly sponsor specific programs open to the general public. Of course, they may not discriminate in providing such programs. But sponsorship of such programs should not destroy their right to maintain their restricted-class membership policies for strictly member functions.

4. The associational rights of membership organizations are not limited to activities expressly enumerated in the First Amendment.

The dissenting judge below would hold that the freedom-of-association guarantee is limited to activities specifically enumerated in the First Amendment. He would deny application of that guarantee here on the ground that the male-only membership restriction has "no relationship" to the U.S. Jay-

cees' speech and advocacy, and "does not enhance the effectiveness of the * * * [Jaycees'] type of advocacy * * *." (J.S. App. A-45.) This position is erroneous for two reasons.

First, it ignores this Court's rationale in *Gilmore* v. *City of Montgomery*, *supra*, and other cases, that freedom of association protects the formation and membership functions of a membership association from unwarranted governmental regulation. Nothing in those cases, and lower court cases which have followed them, has narrowly limited freedom of association to the types of conduct specifically enumerated in the First Amendment. For example, there is no reason why the membership restriction of the B'nai B'rith Women—an all-female Jewish organization[7]—should be given greater constitutional protection than the all-female restrictions of secular sororal societies, simply because free exercise of religion is specifically enumerated in the First Amendment.

Secondly, specific proof of a nexus between membership restrictions and the communications activities of a membership association is not necessary, because such communication is inherently linked to the essential character of the association, and that character is a product of its memberhip restrictions.[8] As the majority opinion below stated, "An organization of young people, as opposed to young men, may be more 'felicitous,' more socially desirable, in the view of the State Legislature, or in the view of the judges of this Court, but it will be substantially different from the Jaycees as it now exists." (J.S. App. A-24—A-25.)[9]

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[7] Gale, *Encyclopedia of Associations*, *supra*, at 1117.

[8] A class restriction on membership is a prerequisite to and distinguishing characteristic of a fraternal society. 36 Am. Jur. 2d *Fraternal Orders, Etc.* § 56 (1968).

[9] The interweaving of the peculiar philosophy of a fraternal association and its gender restriction is similarly explained in Kauffman, *Faith & Fraternalism* 124 (1982):

> The Massachusetts Catholic Order of Foresters admitted women on an equal footing with men. Had the Knights of Columbus followed suit, it would have entailed a drastic alteration of its

For example, fraternal societies were typically established by working men for two purposes: (1) to provide an organizational framework for social events which would build fraternal spirit; and (2) out of such spirit to develop and implement mechanisms to provide for the members' wives and children, through insurance, self assessments, philanthropy, and other means. As fraternals became established, they typically also provided financial and other support for various charitable programs for nonmembers. Women's auxiliaries were usually established to enable members' wives to conduct their own social and philanthropic programs, and often children's auxiliaries were also established.[10]

As the literal meaning of the word "fraternal" indicates, such associations have generally been limited to men. However, similar sororal societies, based on a like spirit of kinship, sociability and mutuality, and carrying out comparable, but distinct, benevolent, social and philanthropic programs, exist for women.

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character. Traditional notions of the male role permeated every aspect of Columbian fraternalism. The ceremonial "rite of passage" was intended to inbue the member with a "manly" sense of pride in his Catholicism and a strong dedication to defend the faith. The insurance program was a medium for expressing the breadwinner's economic responsibility for his family. The K. of C. council was a place where Catholic men could find social sustenance for their struggle as a minority group within a hostile society and where they could unite in the militant promotion of Catholic interests. * * * This identification with masculinity was so strong that the resolution admitting women into the Order never reached the floor of the National Council, either in 1895 or at any subsequent meeting. * * *

Ladies' auxiliaries to various councils did emerge in the late 1890s. Though they were never absorbed as members of the K. of C., some of these auxiliaries were active in the social life of the local councils.

[10] *See, e.g.*, Kauffman, *supra*, at 8-9; Schmidt, *Fraternal Organizations*, 16-20 (1980); 36 Am. Jur. 2d *Fraternal Orders* § 2 (1968); 12 *The Encyclopedia Americana*, "Fraternal Societies," 19-20 (Int'l Ed. 1983).

Social clubs also depend heavily on common bonds among members to achieve their purposes. The essence of a club is restricted membership based on an infinite variety of common traits, such as background, religion, economic status, recreational interests, etc. Because men and women members often perceive that they have different interests and objectives, club membership is frequently all-male or all-female. Class restrictions of this type are often thought to be essential for achieving the goals of a social club, such as fellowship, and mutual enjoyment of recreational activities.

However foolish it may seem to some, it is widely believed by members of some fraternals and clubs that the roles of men and women in society are different, and that the organizations through which men and women strive for personal development should reflect that difference. As times have changed, this philosophy is undoubtedly less universal than it once was. Nevertheless, that philosophy still plays an important role in the lives of millions of "traditional" families. This philosophy inspires such fraternals and clubs to provide civic, public, eleemosynary and social benefits which contribute significantly to the common weal. The expression and practice of this philosophy through the selective common bonds of organizations such as clubs and fraternal orders are as deserving of protection under the freedom-of-association guarantee as the communications activities of such organizations.

Congress itself has frequently recognized the role of single-gender associations in promoting the public welfare, chartering numerous associations with such a restriction. E.g., American War Mothers, 36 U.S.C. § 97 (membership "limited to women" with children in Armed Forces); the Boy Scouts of America, 36 U.S.C. § 23 (purpose "to promote the ability of boys to do things for themselves"); and the Girl Scouts of America, 36 U.S.C. § 33 (purpose "to promote * * * [named] virtues among girls").

Similarly in the instant case, the Jaycees' expressions of positions on political, economic and social matters do not spring full blown from a representative cross-section of the population

at large. Instead, the U.S. Jaycees' positions are inherently a product of the common bond among the members, which includes the restrictions on voting, policymaking and leadership by certain age groups and by women. Government has no right to interfere with the U.S. Jaycees' philosophy and the associational common bonds which implement it. Indeed, government has no right to decide whether or not a change in the U.S. Jaycees' core membership restrictions would involve a change in the association's philosophy. That is solely the right of the U.S. Jaycees' members to determine, through that association's established national internal governmental procedures.

5. Admitting the public to the internal membership processes of an association is not a proper remedy in a public accommodations proceeding.

The Minnesota tribunals also erred by confusing the U.S. Jaycees' programs and services which are open to the general public, and its core membership functions—voting, office-holding, and policymaking—which are limited to males between the ages of 18 and 35. It is of course undisputed that the U.S. Jaycees offers many civic and philanthropic programs to the general public. However, participation in these programs is sharply distinguished from the core internal membership functions, in which only regular members—those satisfying the class membership restrictions—are eligible to engage.

This Court has explicitly recognized the distinction between these essential membership privileges, and organizational services or programs open to the general public. In *Moose Lodge No. 107* v. *Irvis*, *supra*, the Court sharply differentiated between a black individual's claim to access to a fraternal lodge's restaurant and bar which was open to all white male guests of members, and his claim to the full membership privileges in the lodge and order which were not generally open to whites. In a subsequent state case, after this Court denied the black individual's standing to challenge such membership privileges, the Pennsylvania Supreme Court recognized a similar distinction. It held that the Pennsylvania public accommodations law required desegregation of the local lodge's restaurant

and bar, but did not require the admission of black individuals to full membership privileges in the lodge. *Commonwealth of Pennsylvania* v. *Loyal Order of Moose, Lodge No. 107*, 448 Pa. 451, 460, 294 A.2d 594 (1972), *appeal dismissed*, 409 U.S. 1052 (1972).

This distinction between the programs of a membership association generally open to the public, and those internal membership processes which are available only to a restricted class of individuals, is recognized in the language and legislative history of the federal public accommodations statute, 42 U.S.C. § 2000a(e). That statute provides that a private club is subject to the public accommodations law only "*to the extent*" its facilities are open to the public. The legislative history of the Civil Rights Act of 1964 evinces Congress' unmistakable intent to limit nondiscrimination orders to those areas and programs of clubs and fraternal orders which had been generally open to whites, but not to overturn membership, voting and other restrictions which excluded substantial numbers of whites as well as blacks.[11]

Where an association has operated a restaurant or bar or other similar facility open to the public, desegregation orders have virtually always been limited to such public facility. The courts have not required that blacks be allowed to participate in governing the association—in voting, policymaking, and officeholding.[12]

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[11] 110 Cong. Rec. 7404, 7407 (remarks of Sen. Magnuson); 110 Cong. Rec. 6008 (remarks of Sen. Humphrey); see also 110 Cong. Rec. 2294 (remarks of Rep. Meador); 110 Cong. Rec. 2296 (remarks of Reps. Williams and Meador).

[12] See generally Annot., *Civil Rights Act—Private Clubs, Etc.*, 8 A.L.R. Fed. 634 (1971); see generally *Fessell* v. *Masonic Home of Delaware*, 428 F. Supp. 573 (D. Del. 1977) (distinguishing, for purposes of applying the "private club" exception to Title VII of the 1964 Civil Rights Act, between the Masons organization itself and a nursing home run by the Masons).

Only where voting and ownership of membership interests have been shown to have been open to all whites, and to constitute an

Just as the public has not been admitted to the internal membership functions where a claimed purely private club was involved, there is similarly no basis for admitting the public to the internal membership functions of a restricted-class membership association like that here. All of the Jaycees programs open to the public are currently open to women. To admit women to the Jaycees' internal voting, office-holding and policymaking functions destroys its associational rights as an all-male restricted-class membership organization—the type of entity protected by the right of association *(Gilmore* v. *City of Montgomery, supra)*. The Minnesota Commission's order in effect holds that an organization which is determined to be a public accommodation must not only provide services to the public, but must also offer the public ownership and governing privileges. Such relief is totally in conflict with associational rights.

6. The Minnesota tribunals erred in confusing the standards for a restricted-class membership association with the standards for a "truly private" club.

By emphasizing the uniform and broad membership classifications of associations such as the Jaycees, Elks, Moose, Altrusa, and B'nai B'rith Women, we do not mean to suggest that those are the only types of restrictions protected by the freedom-of-association guarantee. In addition, there are also the more specific, tailored and subjective restrictions common-

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important benefit in and of themselves, have courts ordered blacks to be accorded access to such governmental and ownership rights. Most of the latter cases have involved community swimming pools and similar recreational facilities, where access to the facilities was inextricably bound up with ownership of property and contract rights, and whose membership rights were open to the public living in a certain area, except for blacks. (See footnote 5, *supra*.) As noted above (*ibid.*), here it is clear that the class membership restriction of the Jaycees is genuine and is not a subterfuge to exclude a few minority individuals.

ly employed by "truly private"[13] or "purely private"[14] social clubs and individual fraternal lodges. Such restrictions include, for example, social status, business affiliations, family background, or even personal grooming. These qualifications need not be rational and may be inconsistently applied, for they represent purely social choices of the members. It is for this reason that truly private fraternal orders and social clubs have been held to be free to set whatever membership requirements they choose, and to administer them as they please. See generally 36 Am. Jur. 2d *Fraternal Orders, etc.* § 60 (1968); 6 Am. Jur. 2d *Associations and Clubs* § 18 (1963).

The two tests for a truly or purely private club are (1) the selectiveness or exclusiveness of the association's choices of members; and (2) the degree of influence exercised by the members over the association.[15] Related factors include the existence of formal membership procedures, the existence of a true fraternal or social purpose, the presence of dues and initiation fees, limitations on the size of the membership, limitations on nonmember use, the sharing of common characteristics by the members, the observance of formalities of organization and control, and the like.[16]

The standards for an "all-Black, all-Oriental, or all-white,"[17] or similar restricted-class organizations, as discussed in the preceding sections, are thus different from those for the "truly private" or "purely private" club. The solely restricted-class association must be uniform in applying its membership quali-

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[13] See *Tillman* v. *Wheaton-Haven Rec. Asso.*, 410 U.S. 431, 438 (1973).

[14] See *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S. at 179, fn. 1 (Douglas, J., dissenting).

[15] E.g., *Daniel* v. *Paul*, 395 U.S. 298, 301-302 (1969); *Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203-1204 (D. Conn. 1974) (3-judge ct.); see generally, Annot., *Civil Rights Act—Private Clubs, Etc.*, 8 A.L.R. Fed. 634, 640-653 (1971).

[16] Annot., *supra*, 8 A.L.R. Fed. at 634-667.

[17] *Gilmore* v. *City of Montgomery*, *supra*, at 575.

fications in order to maintain such restrictions. The truly private club may be as inconsistent as it chooses in applying its membership qualifications, and even employ an arbitrary single-member-veto procedure. Of course, it is possible for an association to be both class-restrictive and purely private—most local lodges of fraternal organizations would satisfy both tests. Indeed, most of the associations represented by CONPOR are both restricted-class membership associations and truly or purely private associations.

The Minnesota tribunals and the district court below confused these two standards, and consequently ordered the end of the all-male class restriction on the grounds that the Jaycees was not purely private. But that is not the issue in the instant case; the issue here is the right of a restricted-class membership organization to maintain a gender-restricted membership policy.

It is obvious that the State tribunals' standard would lead to the destruction of many restricted-class associations which are not "truly private." For example, any "practical" male Catholic over 18 years of age is eligible to join the Knights of Columbus, without being subject to any other membership qualification. The absence of a truly private membership selectiveness does not mean that this organization must admit the general public. Similarly here, the U.S. Jaycees' freedom-of-association rights to a restricted-class membership are not forfeited merely because it may not be a purely private club.

Even if the Jaycees were held not to be a purely private association, this would not mean that it failed to meet the standards of a restricted-class association. The membership requirements of each type of association are entitled to protection under the freedom-of-association guarantee. If restricted-class membership associations were subject to redrafting of their membership policies by government bureaucrats or by the courts, they would eventually lose their unique identity and singular vigor, and eventually become moribund. Such a result would deal a needless and harmful blow to the rich traditions of pluralism and fraternal benevolence which are bulwarks of our Nation.

II

THE MINNESOTA COMMISSION HAS SHOWN NO COMPELLING PURPOSE FOR ITS MANDATORY ORDER WHICH SEVERELY ABRIDGES THE U.S. JAYCEES' ASSOCIATIONAL RIGHTS

Where a governmental action like the mandatory order here will curtail the freedom to associate, that action will be subject to the "closest scrutiny." *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976). The Commission may not satisfy this burden by showing merely a "legitimate state interest." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976). Instead, the Commission bears the burden of demonstrating that the governmental interest sought to be advanced is "paramount" and "of vital importance." *Buckley* v. *Valeo*, *supra*, at 33. Moreover, the Commission must also demonstrate that its governmental purpose cannot be achieved by more narrowly suited means which do not broadly stifle fundamental personal liberties. *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964); see *Larson* v. *Valente*, 456 U.S. 228 (1982).

In the instant case, the court of appeals correctly held that the Commission had not satisfied its burden. (J.S. App. A-23—A-31, A-36—A-37.) The statute sought to be enforced was mainly aimed at discrimination by traditional public accommodations such as inns and restaurants, and there were no legislative or judicial findings that all-male clubs prevented women from obtaining the business skills which they need to advance professionally. (J.S. App. A-28—A-29.) In fact, the Commission and the State Supreme Court have implicitly urged a policy which would permit other all-male (and all-female) civic and service clubs—such as Kiwanis International—to continue their gender membership restrictions. (See J.S. App. A-29.) Indeed, it is clear that there are numerous other civic and service associations, many of which are open to women only, or to both men and women; the State made no showing that these other associations could not provide businesswomen with comparable membership benefits.

The minimal or nonexistent benefit to gender equality furthered by the Commission's order is decidedly outweighed by the order's severe abridgment of the U.S. Jaycees' associational rights. The order emasculates the essential character of the U.S. Jaycees, imposes a sanction of banishment from the State, and even deprives the national organization of the right to prevent nonaffiliated associations from operating under the "Jaycees" name.

The Commission's reliance on racial discrimination cases to support the alleged compelling character of its prohibition on gender restriction is misplaced. The prohibition on "separate but equal" schools, which the Minnesota Commission attempts (Br. 26) to apply to voluntary membership associations, has no place in this context. The ban on separate-but-equal schools arises from the compulsory nature of public schooling, and barriers to educational development inherent in such separation. Because racially discriminatory *private* schools undermine racially nondiscriminatory *public* schools, and the Thirteenth Amendment specifically authorizes the elimination of private racial discrimination in certain contexts, the freedom-of-association guarantee has been interpreted as narrowly as possible in the context of racially discriminatory private schools. E.g., *Bob Jones Univerity* v. *United States*, 103 S.Ct. 2017 (1983); *Brown* v. *Dade Christian Schools*, 556 F.2d 310, 323, 324 (5th Cir. 1977) (en banc) (Goldberg, J., concurring); *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976). In contrast, the Thirteenth Amendment does not apply to gender classifications,[18] and gender-restricted fraternals and clubs

[18] In *Runyon* v. *McCrary*, 427 U.S. 160, 167 (1976), this Court stated, "[These cases] do not present the question of the right of a private school to limit its student body to boys [or] girls . . . since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity." Accord, *Knott* v. *Missouri Pac. R.R.*, 389 F. Supp. 856 (E.D. Mo.), *aff'd*, 527 F.2d 1249 (8th Cir. 1975); *Rackin* v. *University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974); *Troy* v. *Shell Oil Co.*, 378 F. Supp. 1042 (E.D. Mich. 1974), *appeal dismissed*, 519 F.2d 403 (6th Cir. 1975); *Olsen* v. *Rembrandt Printing Co.*, 375 F. Supp. 413 (E.D. Mo. 1974), *aff'd*, 511 F.2d 1228 (8th Cir. 1975); *Held* v. *Missouri Pac.*

have often been viewed as beneficial to society.[19] The Minnesota Commission has no expressed policy of attempting to outlaw all or most gender-restricted membership associations.

The entire civil rights jurisprudence of this country demonstrates that governments have the power to prohibit racial discrimination in many circumstances where sex restrictions are permitted. For example, government-sponsored racial discrimination is subject to a "strict scrutiny" which amounts to a virtual *per se* prohibition. On the other hand, government-sponsored sex discrimination will be permitted if a legitimate and important governmental object substantially related to the discrimination can be demonstrated. E.g., *Rostker* v. *Goldberg*, 453 U.S. 57, 67, 78-79 (1981); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982). The Thirteenth Amendment and implementing laws (42 U.S.C. §§ 1981, 1982), which broadly bar racial discrimination in contractual and property transactions among private parties, do not apply to sex discrimination.[20] The federal Civil Rights Act, 42 U.S.C. § 2000a, prohibits racial discrimination, but not sex discrimination, in public accommodations.

In sum, the Minnesota Commission has demonstrated no significant governmental purposes in subjecting true membership organizations like the U.S. Jaycees to classification as a "public accommodation." By contrast, the U.S. Jaycees has shown that the Commission's order would require the Hobson's choice of leaving the State, or subjecting its essential

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R.R., 373 F. Supp. 996 (S.D. Tex. 1974); *League of Academic Women* v. *Regents of Univ. of Cal.*, 343 F. Supp. 636 (N.D. Cal. 1972); *Williams* v. *San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972); *Fitzgerald* v. *United Methodist Community Center*, 335 F. Supp. 965 (D. Neb. 1972).

[19] See, e.g., *Bryant* v. *Zimmerman*, 278 U.S. 63, 75-76 (1928); see Minn. Code Ann. §§ 64A.48, subdiv. 4, 64A.44, which expressly exempt fraternal beneficiary associations from all non-real estate taxes levied for state, county or municipal purposes.

[20] *Supra*, note 18.

character to a fundamental transmutation. The interest of the State is thus slight, or nonexistent, while the U.S. Jaycees' constitutional rights would be severely curtailed.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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